

Bail Slip

The Appellant/Accused was directed to be released on Bail in and by the Order of this Court dated 25.04.2001 made in CrI.Mp.No.2027 of 2001 in CrI.Appeal No.284 of 2001 on the file of the High Court Madras.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:- 23.07.2007

Coram:-

The Hon'ble Mr. Justice R.REGUPATHI

Criminal Appeal No.284 of 2001

Mansoor Ali Khan

... Appellant/Accused

vs.

State by Inspector of Police,
R.2, Kodambakkam Police Station,
Chennai.

... Respondent/Complainant

Appeal against the Judgment of the Principal Sessions Judge, Chennai, dated 27.3.2001, in S.C. No.579 of 2000.

For Appellant

: Mr.A.Natarajan, Senior
Counsel for Mr.G.R.Edmund.

For Respondent

: Mr.Hasan Mohamed Jinnah,
Govt. Advocate (CrI. Side)

J U D G M E N T

The appellant was tried by the learned Principal Sessions Judge, Chennai, in Sessions Case No.579 of 2000, for the offences punishable under Sections 376, 417 and 506 (ii) IPC. By Judgement dated 27.03.2001, the learned Sessions Judge found the accused guilty under Section 376(1) IPC. and sentenced him to undergo rigorous imprisonment for seven years and to pay a fine of 3,00,0000/-, in default, to undergo simple imprisonment for 1 ½ years. The learned Sessions Judge found the accused also guilty under Section 417 IPC. and sentenced him to undergo R.I. for

six months and to pay a fine of Rs.25,000/-, in default, to undergo simple imprisonment for 1 ½ months. The sentences were ordered to run concurrently. The accused was acquitted in respect of the offence under Section 506 (ii) IPC. The total fine amount of Rs.3,00,000/- was directed to be paid to the victim and her child born through the accused as compensation. Aggrieved against the conviction and sentence passed by the trial court, the present appeal has been filed before this Court.

2. In brief, the prosecution case is that the accused, who employed PW-1/victim girl as his Secretary/Assistant, on 08.12.1996, asking her to assist him in his transactions, took her to a Hotel; that, during the course of their stay in the Hotel, he administered sedatives through juice and on PW-1 becoming unconscious after consuming the juice, committed rape on her; that, even after PW-1 regaining consciousness, by consoling her and creating a strong impression that he would marry her, again he had intercourse and continued the intimacy for a substantial period; and that, on PW-1 becoming pregnant, when she insisted the accused to establish the marriage tie, he asked her to undergo abortion and refused to marry and ultimately after delivery of a child deserted her. The victim, when approached the police at the advanced stage of pregnancy, was asked to come after delivery; hence, finding that her complaint is not being registered, she sent the complaint dated 29.04.1998 through registered post to the Commissioner of Police, and ultimately, the same was taken on file by the respondent police on 21.5.1998. In the meantime, on 24.05.1998, she gave birth to a female child.

3. During trial, the prosecution examined PWs-1 to 10 and marked Exs.P1 to P12 to establish its case while the defence filed two documents as Exs.D1 and D2, however, did not choose to examine any witness.

4 (A). It would be relevant to focus on the case of the prosecution as spoken to by PW-1/the victim, who was aged about 23 years at the time of occurrence and 27 while giving deposition. According to her, during November, 1996, she saw an advertisement in a Tamil Daily for the post of Secretary in the Office run by the accused. She attended the interview and the accused, collecting phone number from her, told that he would call her after his trip to Bangalore. A week thereafter, on 08.12.1996, the accused asked her to wait for him at the Bus-Stop near Meenakshi College, Kodambakam High Road. The accused picked up PW-1 and took her to a Hotel by name Maurya, where in a room opposite to the Lift, there were 5 to 6 persons connected to cine industry with whom he held discussion and asked PW-1 to make note of the discussion. Thereafter, he took PW-1 to Room No.402 and asked her to wait there. After a short while, the accused came there along with Room-Boy, who brought bread sandwich and juice for her, and stating that he would come shortly, he left the room. On consuming the juice, PW-1 felt giddy and at that time, the accused entered in and locked the doors from inside. He removed the garments of PW-1, who was losing consciousness due to the impact of the sedatives administered to her, and had sexual intercourse with her. On

regaining consciousness, PW-1 found her naked and started weeping, whereupon, the accused consoled her by saying that he would not abandon her and promised that he would definitely marry her. The accused further told that his wife, who is an illiterate, is ill-treating him; therefore, he would divorce her and thereafter marry PW-1. He requested the accused not to divulge the happening to anyone as it would affect his image as a film actor and his income and would also considerably reflect upon the victim as they are going to unite in marital life. Even though PW-1 refused and complained pain, he again had sex with her and she was not able to prevent him due to feebleness. Thereafter, the accused dropped her near the Bus Stop and asked her to go back to her residence. PW-1 did not inform the incident to her family members. Subsequently, on the request of the accused, PW-1 was willingly accompanying him to various places/outstations and the relationship between them continued. During April, 1997, the accused set up a watch shop and put PW-1 in charge of the same. PW-1 was also accompanying the customers of the accused in the real estate business during Holidays. While so, she became pregnant and revealed the said fact to the accused, whereupon, he persuaded for abortion and took her to a Nursing Home during August 1997. When the Medical Officer asked her opinion as to whether she is willing for a surgery for the purpose of abortion, she refused therefor. When the victim went to the office of the accused and informed him of her refusal for abortion, the accused got wild and, by stating that it was only the victim who voluntarily came to him to have sexual relationship, that he has got two wives and families to look after and that he would not marry her, asked her to leave the Office and also beat her. Thereafter, PW-1 continued to persuade the accused to take her with him. Accepting her request, he took her to his sister's husband, who was running a shop opposite to Chennai Corporation Office, and by introducing PW-1 as his wife and stating that she is pregnant, requested him to arrange for PW-1's stay at Bangalore with his family till her delivery. Accordingly, PW-1 was taken to Bangalore, where she stayed for four weeks and as there arose misunderstanding between PW-1 and the sister of the accused, she returned back. The accused took PW-1 to the house of his second wife, where she could not stay beyond three weeks due to disagreement. Subsequently, she returned back to the residence of her mother, where she was not admitted. On her request, the accused made her to stay at his friend's place where construction activity was going on; hence, she feared to stay there. When she threatened the accused that she would commit suicide, he came to her and made arrangements for her stay at different places. Subsequently, the accused quarrelled with her and also assaulted her, as a result of which, she was admitted in J.J. Hospital as In-patient for a week. After discharge, she went to Kodambakkam Police Station to lodge a complaint during night time. She was persuaded by the Police Officer to go back and come during day time for giving complaint. Accompanied by her father, PW-1 again came to the police station and gave complaint. On coming to know of the same, the accused came to her, took her and fetched a rental house at Venkateswara Nagar for her stay. In the meantime, the accused persuaded her to withdraw the complaint given to the police to the effect that the accused is not responsible for her pregnancy and that the father of child

she is carrying is in Dubai, for which, she refused. Thereafter, since the accused quarrelled again with her, with the assistance of her father, she reported the matter to the police and also informed the press. She was kept in Jawahar Home for two weeks, during which time, the accused took her to the residence of his second wife and as there was quarrel between the accused and his second wife, she was not even allowed to stay during night and was expelled therefrom. Since she developed labour pain at that time, she was taken to the nearby hospital for treatment. On 24.05.1998, she gave birth to a female child. After discharge from the hospital, she went taking the baby with her to the residence of the accused, however, she was not admitted by the accused. PW-1, at the first instance sent a complaint to the police through registered post, and thereafter in person went to the police station and lodged the complaint. In November, 1998, she gave a statement before the IX Metropolitan Magistrate, Saidapet, Chennai. She along with her baby was sent for medical examination.

(B) PW-2 is the Medical Officer attached to Child Welfare Medical and Research Institute. She has spoken to about the taking of blood samples for conducting D.N.A. Test from PW-1, her child and the accused. PW-3 is the Medical Officer, who is running J.J. Hospital. She has stated that she gave treatment to PW-1 in her Hospital during April 1998 as she complained pain; that after treatment, PW-1 was discharged; and that, at the time when PW-1 was undergoing treatment, the accused visited her twice. PW-4 is the Health Inspector, who issued Birth Certificate, dated 19.06.1998, in respect of the child born to PW-1 on 24.05.1998.

(C) PW-5 is the sister's husband of the appellant. He has been examined by the prosecution to speak about the accused entrusting the custody of PW-1 with him to take her to his residence at Bangalore and about her stay in his residence; however, since he has not supported the case of the prosecution, he has been treated as hostile witness.

(D) PW-6 is the Medical Officer, who admitted PW-1 in the Hospital run by her for delivery after obtaining consent from the appellant. He has deposed to the effect that PW-1 was admitted for delivery and after giving birth to a female child on 24.05.1998, she was discharged on 26.05.1998 and that it is the appellant who settled the hospital bills.

(E) PW-7 is the Manger of the Hotel 'Maurya International', Madras. He has stated that during December, 1996, four rooms including Room No.402 were booked by Akshaya Films, Bombay, for holding discussion. PW-8 is the Medical Officer who examined the accused for virility and issued Ex.P-6 in that regard.

(F) PW-9 is the Inspector of Police, who, on receipt of the complaint forwarded from the Office of the Commissioner of Police, registered a case in Crime No.1334 of 1998 for offences punishable under

Sections 417, 341, 323, 294(b) and 506 (2) IPC. Ex.P1 is the complaint and Ex.P7 is the Printed F.I.R. During the course of investigation, he recorded the statement of witnesses. He has stated that the statement of the complainant under Section 164 Cr.P.C. was recorded by the Metropolitan Magistrate on 02.11.1998. The accused was arrested on 11.12.1998 and was remanded to Judicial custody. PW-9 took steps to conduct D.N.A. test for PW-1, the child and the accused and received the report on 02.02.1999. While proceeding with the investigation, he collected materials and documents in the form of hotel receipts, medical reports etc. Further investigation was taken up by PW-10, who after completing the investigation, filed final report for offences punishable under Sections 421, 342, 294(b), 506 (ii), 376 and 413 IPC.

(G) When the accused was questioned under Section 313 Cr.P.C., while answering in the affirmative for some of the questions, he denied others. The appellant admitted the fact of PW-1 joining his Office as Assistant, her admission in the hospital for delivery, settlement of hospital bills by him, blood samples taken from him for conducting DNA test and also the fact that he was having sexual relationship with PW-1; however, he stated that it is only due to the compulsion on the part of PW-1, he was having such affair with her.

(H) On the side of the defence, two documents have been marked as Exs.D1 and D2. Ex.D1 is an affidavit that was filed by PW-1 before the Court of Sessions at Chennai in CrI.M.P. No.8263 of 1998, in which, it is stated by PW1 that she was not aware of the contents of the complaint. Denying the contents of the statement made by her under Section 164 Cr.P.C. before the Magistrate, it has been emphatically stated in the affidavit that the appellant never had any forced sexual relationship with her and that she was neither threatened nor assaulted by the accused. Ex.D2 is a letter written by PW-1 wherein she has stated that she is in love with the appellant. Insofar as Ex.D1 is concerned, PW-1, in her cross examination, stated that such affidavit has been filed by her on the compulsion of the relatives of the accused to secure his bail and insofar as Ex.D2 is concerned, though her signature is admitted, she has denied the contents of such letter.

5. The learned trial Judge, on perusal of the oral and documentary evidence and considering the arguments advanced on either side, passed an order of conviction and sentence against the accused as aforementioned.

6. Learned Senior Counsel for the appellant, by pointing out that the prosecution case rests mainly on the testimony of PW-1 and that since her testimony can be proved to have tainted with improvements and deviations when contrasted with the F.I.R and her statement under Section 164 Cr.P.C. before the Magistrate, would submit that the case of the prosecution shall fall to ground. According to him, in the complaint, though PW-1 has stated that she was given a cool drink and after taking the same she became unconscious, nothing has been mentioned about the act of rape by the appellant except stating ' ... when I regained conscious I

found that I was deserted by him. .." Similarly, though it is simply stated in the complaint that the affair with the accused continued and that the accused made all arrangements to send her out of country by getting passport, in her evidence, PW-1 has given an exaggerated narration about the happening by building up her story. In the complaint, the name of the Hospital finds place, however, the date on which she was admitted there is not mentioned. Learned Senior Counsel made specific reliance on the date and timing mentioned by PW-1 in her evidence viz., on 08.12.1996 at 1.30 P.M., she was taken by the accused to Room No.402 at Maurya Hotel, where she was subjected to rape, and that she returned to her residence by 7 P.M. on that day. He pointed out that the prosecution relied on Ex.P-3 Hotel Receipt, wherein, it has been stated that Room No.402 was booked by Ayesha Films, Mumbai, on 08.12.1996 at 8 P.M. for a week. According to him, the above aspects would go to show that the occurrence had not taken place at the time and in the manner as alleged by the prosecution. Though the fruit juice containing sleeping pills is said to have been given to PW-1 by the accused through Room-body, the said Room-boy has not been examined. Failure on the part of the prosecution to examine such crucial witness is fatal to its case. Several improvements have been made in the testimony of PW-1 before Court, however, for such improvements no corroborative materials have been produced. Though it is alleged that the first act of sex with PW-1 took place on 08.12.1996 and that she has quarrelled with the appellant, it is the case of PW-1 that she never informed the same to anyone including her parents. Though the explanation given by PW-1 is that she remained silent on the promise made by the appellant that he would marry her, the fact remains that she kept quiet for months together without divulging the relationship to anybody. The complaint has been given on 29.04.1998 for the occurrence that took place way back in 1996 ie., on 08.12.1996, with considerable delay. The case was taken on file on 21.05.1998. After the occurrence, PW-1 continued the sexual relationship with the appellant and she accompanied him to various places. Only after she became pregnant and when the appellant asked her to get aborted, the terms between the appellant and PW-1 became bitter.

Referring to the evidence of PW-1, learned Senior Counsel submits that it is apparent that at the time when PW-1 was admitted in the Hospital for delivery, it is the appellant who went there and settled all the bills and that he made all possible efforts to make her live along with his wives and that only because of the attitude of the 1st and 2nd wife of the accused, PW-1 could not be kept in those places. Further, when questioned under Section 313 Cr.P.C., he has admitted his paternity to the child. Though initially, case against the accused was registered under Section 417 IPC. along with other penal provisions, only on conclusion of the investigation, to strengthen the case of the prosecution, Section 376 IPC. has been purposely added. Even on the date of occurrence, PW-1 was aged about 23. On a perusal of the evidence of PW-1 and Ex.P-1, it is quite evident that the relationship from the inception was only with the willingness of PW-1 and that her subsequent conduct fortifies only the defence of the appellant.

At any rate, according to the learned Senior Counsel, in view of the conduct of PW-1, viewed in the background of the above aspects, would only lead to a definite conclusion that no such occurrence and meeting took place at the relevant time and even so, it cannot be categorised as rape. He further submits that though there is no material to indicate that the appellant was continuing the affair with the victim on the promise of marriage, the fact remains that he was having such relationship with her consent and willingness, which ultimately resulted in the victim becoming pregnant and giving birth to a child. In such circumstances, he submits that the accused may be accountable for damages under civil law and that the conviction and sentence imposed by the court below may be set aside.

7. Per contra, learned Government Advocate submits that, though the complaint was given belatedly in this case where the offence alleged to have been committed is rape, the fact remains that the first act was committed by the appellant by way of administering juice mixed with sedative and it is only thereafter, PW-1, unable to wriggle out from the situation, continued the affair. Even though PW-1 is a major and the offence under Section 376 IPC. may not be made out, because of the promise made by the appellant, PW-1 continued the affair, resulting in her pregnancy and giving birth to a child. According to him, since materials are available to show that the appellant made false promise to allure the victim, he is liable to be convicted at least under Section 417 IPC.

8. I have carefully perused the materials available on record and considered the submissions made by the respective counsel.

Three charges have been framed by the trial court against the appellant/accused for the offences punishable under Sections 376, 417 and 506 (ii) IPC. and on conclusion of the trial, the learned trial Judge, holding that two of the charges have been proved by the prosecution, convicted the accused under Sections 376 and 417 IPC. As could be seen, the first charge is that between 08.12.1996 and 10.12.1996, one day, at about 2 P.M., PW-1 was given fruit juice mixed with stupefying substance at the instance of the accused and, at the time when she became unconscious, without her consent, the appellant committed rape on her. The second charge is that, subsequent to the first occurrence, the appellant had intercourse with PW-1 on many occasions on the promise of marriage and when she became pregnant as a result thereof, he failed to marry her.

To appreciate the allegations made in the first charge, the evidence of PW-1 and the complaint given by her must be scrutinised carefully. The occurrence is alleged to have taken place on 08.12.1996 and the complaint was given on 29.04.1998, wherein it has been specifically stated as follows:-

" Immediately after drinking cool drink I lost my conscious. After half hour or so when I regained conscious I found that I was deserted by him. On telling he promised

me to marry and asked me to join the duty in his real estate shop. ... "

Interestingly, nowhere in the complaint, PW-1 alleged that the appellant indulged in sexual intercourse with her; that is the reason why, on the said complaint, case was registered by the police under Sections 417, 341, 323, 294(b), 506 (ii) IPC. Later on, during the course of investigation, she was produced before the Magistrate for the purpose of recording statement under Section 164 Cr.P.C. After collecting other materials, only at the time of filing the final report, the offence under Section 376 IPC. came to be included, resulting in framing of the first charge by the trial court. In this context, it is useful to refer to the 'fifthly circumstance' falling under Section 375 IPC., which reads as follows:-

" Fifthly:-- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. "

Both in the complaint and in the evidence of PW-1, it has been stated by her that she became unconscious on taking the juice mixed with stupefying substance, given to her at the instance of the accused. Though in the complaint, the sexual intercourse by the appellant has not been mentioned at all, in her evidence before Court, PW-1 gives a narration of what had happened on that day. It is pertinent here to mention that if the evidence of the prosecutrix is reliable and free from improvements and contradictions, the same can be solely acted upon by the court without even looking for corroboration by other materials. However, in view of the absence of allegation in the complaint regarding sexual intercourse by the appellant with PW-1, a cautious and careful scrutiny of her evidence is required to be made.

It is the charge against the appellant that the first act of rape took place around 2 P.M. In her evidence, PW-1 positively stated that she left the home on the occurrence day i.e., on 08.12.1996, at 1.30 P.M and from the Bus Stop, she was taken by the appellant to the Hotel, where she was asked by him to wait in Room No.402 and after some time, bread sandwich and juice were delivered to her through a room-boy. After narrating the act of rape committed on her by the appellant when she became semi-conscious, she states that, on regaining consciousness, she felt pain and started crying and, at that time, the appellant said that he would divorce his wife as she, being an illiterate, is harassing him, and assured that as soon as she is divorced, he would marry her and also requested her that the relationship between him and PW-1 should not be divulged to anybody as he being a cine-actor, the same would damage his image and he would not get chances in films and he may also lose his income. PW-1 further states that though she resisted, he again had sex with her and thereafter directed her to go back to her residence and at

the time she reached her house it was about 7 P.M. Thus, even as per her evidence, on that day, she was in the company of the appellant between 1.30 P.M. and prior to reaching her residence at 7 P.M.

Pausing here, it is useful to turn towards the deposition of PW-7, the Hotel Manager, who has been examined to substantiate the booking of Room No.402 by Akshaya Films for holding discussion, and through whom Ex.P-3 Guest Registration Card has been marked. It is his positive evidence that he had never seen/met PW-1 in the Hotel on any date. Though it has been specifically mentioned that the room has been allotted as per Ex.P.3 only at 8 PM. on 08.12.1996, no further question has been put to this witness so as to substantiate that the appellant already visited the hotel prior to 8 P.M. Further, it is the positive case of the prosecution that fruit juice has been given to PW-1 through a Room-Boy, however, he has not been examined as a prosecution witness. Similarly, though it is the case of the prosecution that along with the appellant several other persons were also staying with him on arrangements made by Akshaya Films for holding discussion, those persons were not examined. At any rate, at the alleged time of occurrence, Room No.402 was not at all occupied by the appellant; that being so, I am of the considered view that PW-1 would not have visited the appellant in Room No.402 as alleged in the charge. Therefore, the charge that a meeting took place between 08.12.1996 and 10.12.1996 is not substantiated. Added to that, even in the complaint Ex.P-1, no specific allegation of rape has been made by PW-1, hence, initially, the police did not register the case under Section-376 IPC. Moreover, admittedly, after the first meeting, PW-1 was willingly roaming around with the appellant without even informing her parents to several places including outstations. The conduct of PW-1, aged about 23, would go to show that she was moving freely and friendly with the appellant and continued the sexual affair with whole consent.

It is also seen that the complaint was given on 29.04.1998, case was registered on 21.05.1998 and, during the course of investigation, the appellant was arrested. Along with the bail application, requesting for release of the accused on bail, PW-1 filed an affidavit/Ex.D1 before lower court, wherein she stated as follows:-

" It is true that a complaint signed by me was given to the respondent police through my father when he was alive in the month of May 1998. I am not even aware of the contents of the complaint. Thereafter Mr.Mansoor Ali Khan informed me that a complaint signed by me against him has been given to the (L&O) R-2 Police Station. Denying the Complaint and narrating the actual events I swore a declaration before a Notary public on the 22nd of May 1998 and sent it to the respondent police as well as the city Commissioner of police. Thereafter I was having good relationship Mr.Mansoor Ali Khan.

I hereby state that Mr.Mansoor Ali Khan never had any forced sexual relationship with me, never threatened me or assaulted me. ..."

In this regard, when PW-1 was confronted with the contents of Ex.D1 during the course of cross examination, admitting the filing of such affidavit, she has simply stated that she did so on the promise given by the brother of the appellant that marriage between her and the appellant would be performed after the appellant was released on bail.

Ex.D2 is a letter alleged to have been written by PW-1 to the appellant, wherein, she has expressed her mad love towards the appellant. Though she has accepted her signature alone and denied the contents of the letter, on carefully scrutinising the strokes of the words written, comparing the same with the signature and other sequences, a safe conclusion could be arrived at that it is she who wrote the contents of the letter also. No further clarification from her was elicited by the prosecution that such signature was assigned in a blank sheet and that the appellant would have filled up the same. In fact, the language written is unprintable but conveys her mad love towards him.

On a perusal of the contemporaneous materials, I am of the considered view that PW-1 was moving with the appellant on her own volition and it is hard to believe that she had consented to sexual intimacy with him only as a consequence of her belief, based on his promise that they would get married in due course. Hence, it can be safely concluded that the case of the appellant would not fall under Section 376 IPC. (fifthly).

It is also seen that after PW-1 becoming pregnant and on being forsaken by her parents, to accommodate her, the appellant took her to the residence of his wife, his brother in law's residence at Bangalore and also to the residence of his friends etc. When she was admitted in the hospital for prenatal healthcare, the appellant settled the hospital bills. Similarly, only after obtaining his consent, PW-1 was admitted for delivery and it is the appellant, who cleared all the bills. All these facts were not denied by the appellant in his statement under Section 313 Cr.P.C. Therefore, the fact remains that the appellant and PW-1 were continuously having affairs till delivery of child. It is only after delivery, the quarrel between them worsened resulting in filing of the complaint against the appellant. It is the assertion and specific case of the appellant that only PW-1 compelled him to have such relationship with her. The whole prosecution case rests on the evidence of PW-1 and as could be seen from the various aspects pointed out above in respect of her evidence, it is not safe to sustain the conviction under Section 376 IPC. against the appellant. Other prosecution witnesses are not of much use except to speak about the DNA test conducted to substantiate that the child born to PW-1 was through the appellant. In such circumstances, I am of the considered view that the offence under Section 376 is not made out.

9. Coming to the allegation levelled against the appellant under Section 417 IPC. as per the second charge, the promise made by the appellant to marry PW-1 and his incessant sexual relationship with her resulting in pregnancy and delivery must be taken into consideration. There are ample materials to substantiate through the evidence of PW-1 and other corroborative factors the sexual relationship between PW-1 and the appellant, however, the promise given by the appellant prior to the commission of such act could not be substantiated by the prosecution. Though it is the case of PW-1 that she consented for continuing the relationship only on the promise of the appellant, the same has not been proved beyond reasonable doubt. In this context, it is relevant to refer to the decision of the Supreme Court reported in 2003 SCC Criminal 775 (Uday vs. State of Karnataka), wherein, the consequence of such consent if so given has been taken into consideration and it was held as follows:-

" 21. It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

22. The approach to the subject of consent as indicated by the Punjab High Court in Rao Harnarain Singh and by the Kerala High Court in Vijayan Pillai has found approval by this Court in State of H.P. v. Mango Ram. Balakrishnan, J. speaking for the Court observed (SCC pp.230-31, para 13)

' The evidence as a whole indicates that there was resistance by the prosecutrix and there was no voluntary participation by her for the sexual act. Submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation

not only after exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances. '

23. Keeping in view the approach that the court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown-up girl studying in a college. She was deeply in love with the appellant. She was, however, aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to them. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste consideration. All these circumstances lead us to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequent of any misconception of fact.

24. There is another difficulty in the way of the prosecution. There is no evidence to prove conclusively that the appellant never intended to marry her. Perhaps he wanted to, but was not able to gather enough courage to disclose his intention to his family members for fear of strong opposition from them. Even the prosecutrix stated that she had full faith in him. It appears that the matter got complicated on account of the prosecutrix becoming pregnant. Therefore, on account of the resultant pressure of the prosecutrix and her brother the appellant distanced himself from her. "

The above case law has been relied on by the Supreme Court in Deelip Singh @ Dilip Kumar v. State of Bihar (2004 (4) Crimes 371), wherein, the question raised by the Supreme Court, the discussion and observation made thereon are germane, hence, the relevant portions are extracted below:-

" 33. The remaining question is whether on the basis of the evidence on record, is it reasonably possible to hold that the accused with the fraudulent intention of inducing her to sexual intercourse, made a false promise to marry? We have no doubt that the accused did hold out the promise to

marry her and that was the predominant reason for the victim girl to agree to the sexual intimacy with him. PW12 was also too keen to marry him as she said so specifically. But we find no evidence which gives rise to an inference beyond reasonable doubt that the accused had no intention to marry her at all from the inception and that the promise he made was false to his knowledge. No circumstances emerging from the prosecution evidence establish this fact. On the other hand, the statement of PW-12 that 'later on', the accused became ready to marry her but his father and others took him away from the village would indicate that the accused might have been prompted by a genuine intention to marry which did not materialize on account of the pressure exerted by his family elders. It seems to be a case of breach of promise to marry rather than a case of false promise to marry. On this aspect also, the observations of this Court in Uday's case at paragraph 24 comes to the aid of the appellant.

34.

35. In the result, the conviction and sentence is set aside and the appeal is allowed.

36. With this verdict, the appellant, no doubt extricates himself from the clutches of the penal law by getting the benefit of doubt on charge levelled against him. But, we cannot ignore the reprehensible conduct of the appellant, who by promising to marry the victim woman, persuaded her to have sexual relations and caused pregnancy. The act of the accused left behind her a trial of misery, ignominy and trauma. The only solace is that she married subsequently. We are informed that the female child born out of the illicit relationship is now living with her married mother and she is about 14 year old now. Though there is no evidence to establish beyond reasonable doubt that the appellant made a false or fraudulent promise to marry, there can be no denial of the fact that the appellant did commit breach of the promise to marry, for which the accused is prima facie accountable for damages under civil law." ,

It is seen that the appellant is a Muslim and PW-1 is a Hindu. She was aged about 23, sufficiently matured and intelligent, at the time of occurrence. She knew that the accused is a married man and a known cinema villain. She was in mad love with the appellant and going freely along with him even to outstations and until she became pregnant, the relationship was not intimated to her parents. Voluntary participation is therefore apparent and her consent was not in consequence of any misconception of fact. It appears from the evidence that the appellant being a Muslim, twice married, though refused to marry PW-1, was openly moving around with her; that, after pregnancy, he took her to his wife's residence and sister's residence at Bangalore and made her to live with them and also set up a separate residence for a while; that only with his consent, PW-1 was admitted in the Hospital for delivery and it is he who

cleared the hospital bills; and that it is only after the complaint, everything got precipitated.

In the light of the principles enunciated on akin issues by the Apex Court in the above two case laws and taking note of the fact that the prosecution has not adduced sufficient materials to prove that the accused promised to marry PW-1 and with that promise continued the sexual relationship and of the fact that PW-1 was a major at that time and a consenting party to the affair, offence under Section 417 IPC is not attracted.

10. However, simply because the accused is disentangled from the penal law, this Court cannot close its eyes to the repulsive approach on the part of the accused with the victim girl in alluring her and continuing the affair, which ultimately resulted in the victim becoming pregnant and giving birth to a female child; and relieve him from accountability for damages under civil law. The paternity of the accused to the child has been well established by the prosecution by subjecting him to DNA Test. Therefore, learned Senior Counsel fairly conceded that the appellant may be liable to pay damages to the victim under civil law. Learned Senior Counsel, on instructions from the appellant/accused, submitted that the appellant is willing to deposit a sum of Rs.7,00,000/- (Rupees seven lakhs only) apart from Rs.3,25,000/- already imposed as fine, all put together Rs.10,25,000/-, and the same may be treated as compensation payable to PW-1 to take care of herself and the child born to her through the accused without prejudice to her other claims. The offer made by the learned Senior Counsel on instructions from the appellant seems to be reasonable.

11. Consequently, the order of the trial court convicting and sentencing the appellant for the offences punishable under Sections 376 (1) and 417 IPC. is set aside and the appellant stands acquitted of the charges. The appellant is directed to deposit Rs.7,00,000/- (Rupees seven lakhs only) before the trial court to the credit of Sessions Case No.579 of 2000 within a period of six weeks from to-day, failing which, the trial court is directed to initiate recovery proceedings known to law against him.

12. The appeal is allowed with the above direction to the appellant/accused.

13. It is seen that the child was born in the year 1998; hence, by this time she would be about 9 year old. It is not known as to whether the victim subsequently got married or not. Hence, it is just and proper to apportion the amount between the victim and the minor child. Accordingly, the victim is entitled to Rs.3,25,000/- and the minor is entitled to the remaining sum of Rs.7,00,000/-. On request being made from PW-1, the lower court shall order payment of her share and the share of the minor shall be kept in her name in a Fixed Deposit with a nationalised bank. The share of the minor child along with interest shall

be payable to her on attaining majority. If required, the interest accrued may be allowed to be withdrawn for the benefit of the minor by the guardian/PW-1. However, for the purpose of meeting the imminent needs of the minor girl, the lower court can permit the amount to be paid over to the guardian/PW-1 either partly or in whole depending on the genuine and reasonable requirements concerning the maintenance of the child.

JI.

Sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

To,

1. The Principal Sessions Judge, Chennai.
 2. The 17th Metropolitan Magistrate, Saidapet, Chennai-8.
 3. -do- Thro' The Chief Metropolitan Magistrate, Chennai-8.
 4. The Superintendent Central Prison, Vellore.
 5. The Superintendent Central Prison, Chennai.
 6. The Inspector of Police, R2,
Kodambakkam Police Station, Chennai-2.
 7. The Public Prosecutor, High Court, Madras.
- +1 cc to Mr.A.R.Nixon, Advocate Sr.No.45382.

AKR(CO)
dcp/16.8

Crl.Appeal No.284 of 2001

सत्यमेव जयते

WEB COPY